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Woodland Theatres, Inc. v. ABC Intermountain Theaters et al : Brief in Support of Petition for Rehearing

Utah Supreme Court

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WOODLAND THEATRES, INC.,
a corporation,

Case No. 14440

Case No. 14441

Defendants-Respondents.

INTRODUCTION

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2. That plaintiff-appellant should recover actual damages resulting from a failure to repair and maintain the theatre; and,

3. That plaintiff-appellant should recover consequential damages resulting from defendants-respondents' breach of an implied covenant to operate the theatre in a reasonable manner so as to produce income in which the plaintiff-appellant would participate through a percentage lease agreement.

On appeal from the District Court's Order granting summary judgment for defendants-respondents with respect to all of plaintiff-appellant's claims, this Court held:

1. Plaintiff-appellant's acceptance of rent waived its claim for termination or forfeiture of the lease;

2. Plaintiff-appellant's acceptance of rent did not constitute a waiver of claims for damages; and,

3. Plaintiff-appellant's claim for consequential damages arising from an alleged, implied covenant to operate the theatre in a reasonable manner did not state a claim upon which relief could be granted.

The Court, however, erred in overlooking plaintiff-appellant's claims for actual damages arising from the failure to maintain and repair specifically set forth in paragraph 9 of the complaint in Civil Action No. 222497.

QUESTION PRESENTED

Should the plaintiff-appellant be allowed to proceed on its claims for actual damages resulting from breaches of the lease agreement which were not waived by plaintiff-appellant's acceptance of rent?

STATEMENT OF FACTS

Plaintiff-appellant's complaint in Civil Action No. 222497 states a claim, in paragraph 9 thereof, for actual damages which resulted from a failure of the defendants-respondents to improve, repair and maintain the theatre premises in specific respects set forth in that paragraph. Such damages are substantial and plaintiff-appellant has significant material facts in support of the lessees' flagrant disregard of their obligations to repair and improve the theatre resulting in substantial damage to the lessor measured by the cost of making the repairs as well as the decline in value of the theatre assets which were not properly maintained and repaired.

Defendants-respondent's sole basis for its Motion for Summary Judgment with respect to the claims is the assertion that plaintiff-appellant waived such claims of breach by its acceptance of rent.

ARGUMENT

I. Plaintiff-Appellant Should Be Allowed to Proceed on Its Claims for Actual Damages Arising from Defendant Respondents' Breach of the Leasehold Agreement.

In its opinion in this action, the Supreme Court has held that the acceptance of rent by plaintiff-appellant did not waive its right to recover damages for breach of the lease. In that respect, the Court stated:

Lessor further contests the ruling of the trial court in so far as it has the effect of barring its right to recover damages for breach of the covenants by accepting rental payments. This point is valid.

The Court, however, construed plaintiff-appellant's damage claims to consist solely of a claim for consequential damages arising from an implied covenant on the part of the lessees to operate the theatre in a prudent manner so as to produce profit in which the plaintiff-appellant would participate through a percentage lease provision. Plaintiff-appellant respectfully submits that its claims set forth in the above-said paragraph 9 of the complaint states a claim for actual damages arising from the failure by the lessees to repair and maintain the theatre as set forth above.

Claims of actual damages resulting from breaches of express provisions of a lease clearly state a claim upon which relief can be granted as the Court acknowledged in its discussions of the case of Wollard v. Schaffer Stores Company, 272 N.Y. 304, 5 N.E. 2d 829, (1936). The damage claims in that case, which were held not to be waived, related to a violation of the lease against making structural changes, which structural changes damaged the lessor in the cost of restoration.

The lessees' breaches in this action, with respect to which plaintiff-appellant makes its claims for actual damages, concern omissions on the part of the lessees to improve and maintain the theatre. As a result of such breaches of the lease, the plaintiff-appellant has been damaged in the cost of restoration and in the decline in the value of the premises. Such damages do not derive from an implied covenant and are not "consequential" in nature. The damages represent actual loss resulting directly from breach of express covenants of the lease. Dismissal of plaintiff-appellant's actual damage claims is, therefore, inconsistent with the position taken by the Supreme Court that such claims are not waived by acceptance of rent.

Plaintiff-appellant respectfully requests the Court to grant rehearing on this issue and modify its opinion so

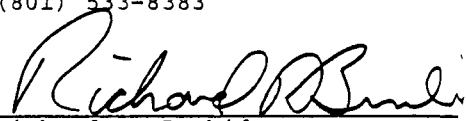
as to allow plaintiff-appellant to pursue its actual damage claims.

DATED this 4th day of February, 1977.

Respectfully submitted,

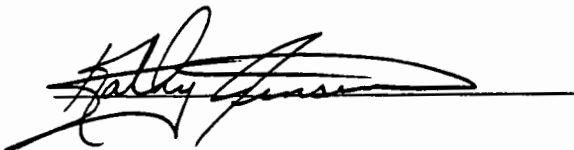
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CERTIFICATE OF SERVICE

The undersigned does hereby certify that on this ____ day of February, 1977, two copies of the foregoing PETITION FOR REHEARING and BRIEF IN SUPPORT OF PETITION FOR REHEARING were served upon counsel for Defendants-Respondents, Roger P. Christensen; Christensen, Jensen, Gardiner & Evans; 900 Kearns Building; Salt Lake City, Utah, 84101, by personal hand delivery of same.

A handwritten signature in black ink, appearing to read "Sally Jensen", is written over a horizontal line.